

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

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ALL Districts

The Texas Transportation Commission (commission) finds it necessary to propose amendments to §§21.602, 21.603, 21.604, and 21.606, relating to Leasing of Highway Assets to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed amendments, attached to this minute order as Exhibits A and B, are incorporated by reference as though set forth verbatim in this minute order, except that they are subject to technical corrections and revisions, approved by the general counsel, necessary for compliance with state or federal law or for acceptance by the Secretary of State for filing and publication in the *Texas Register*.

IT IS THEREFORE ORDERED by the commission that the amendments to §§21.602, 21.603, 21.604, and 21.606, are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:


Director, Real Estate Management
and Development Division

Recommended by:


Executive Director

114094 OCT 30 14

Minute
Number

Date
Passed

Proposed Preamble

The Texas Department of Transportation (department) proposes amendments to §§21.602, 21.603, 21.604, and 21.606, concerning Leasing of Highway Assets.

EXPLANATION OF PROPOSED AMENDMENTS

Transportation Code, Chapter 202, Subchapter C, authorizes the department to lease a highway asset, part of a right of way, or airspace above or underground space below a highway that is a part of the state highways system if the department determines that the interest to be leased will not be needed for a highway purpose during the term of the lease.

The Texas Transportation Commission (commission) last adopted rules relating to leasing of highway assets in 2002. The rules establish a more efficient internal and external procedure for the leasing process, provide the department a variety of methods to award a lease, and enhance the visibility of lease opportunities by establishing a presence on the department's internet website.

Amendments to §21.602, Highway Asset to be Leased, delete verbiage to provide consistency with the statute and clarifies that a lease may be for any purpose and cannot deter the proper maintenance or operation of the highway.

1
2 Amendments to §21.603, Methods of Awarding Leases, provide the
3 department with the ability to pair the most appropriate method
4 of award to a specific highway asset and substitutes publication
5 of the notice on the department's website for 30 calendar days
6 before the date of the award for three newspaper advertisements.
7 The change in procedures for awards and advertisement will allow
8 the department to reach a larger audience, be more efficient and
9 responsive to match current business practices of public and
10 private entities. Subsection (c) is added to address the
11 requirement that not less than fair market value be charged for
12 leases, subject to commission authority to accept less than fair
13 market value as authorized by statute.

14
15 Amendments to §21.604, Lease Agreement, transfer the
16 responsibility for authorizing remedial action from the district
17 engineer to the department in paragraphs (15)-(17). This change
18 will provide for better centralization of the process in an
19 effort to promote consistency and continued coordination between
20 the multiple resources of the department.

21
22 Amendments to §21.606, Requests to Lease, provide a central
23 repository for requests to lease a highway asset by adding
24 submission through the department's website and deleting the
25 requirement to submit a written request to the district engineer

1 of the district in which the asset is located. This change will
2 further the department's efforts to centralize and upgrade
3 request procedures, and continue to expand collaboration between
4 the district engineer, other district personnel and the right of
5 way division. It will allow the department to be more efficient
6 and responsive to these requests. Subsection (c) clarifies that
7 the request for lease is forwarded to the executive director of
8 the department rather than the director of the right of way
9 division when recommendations to the commission are required.

10
11 FISCAL NOTE

12 James Bass, Chief Financial Officer, has determined that for
13 each of the first five years in which the amendments as proposed
14 are in effect, there will be no fiscal implications for state or
15 local governments as a result of enforcing or administering the
16 amendments.

17
18 Mr. Roland Tilden, Director, Real Estate Management and
19 Development Division, has certified that there will be no
20 significant impact on local economies or overall employment as a
21 result of enforcing or administering the amendments.

22
23 PUBLIC BENEFIT AND COST

24 Mr. Tilden has also determined that for each year of the first
25 five years in which the sections are in effect, the public

benefit anticipated as a result of enforcing or administering the amendments will be to further the department's mission to provide an efficient and fair process of leasing highway assets. There will be no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§21.602, 21.603, 21.604 and 21.606 may be submitted to Rule Comments, Office of General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line "Leasing of Highway Assets." The deadline for receipt of comments is 5:00 p.m. on December 15, 2014. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

- 1 CROSS REFERENCE TO STATUTE
- 2 Transportation Code, Chapter 202, Subchapter C.

SUBCHAPTER L. LEASING OF HIGHWAY ASSETS

§21.602. Highway Asset to be Leased.

(a) The commission may authorize the lease of a highway asset if it finds that:

(1) the interest to be leased will not be needed for highway purposes during the period of the lease;

(2) the lease is for a purpose that is not inconsistent with the applicable highway use [~~lessee's use of the property will be consistent with safety, maintenance, operation, and beautification of the state highway system~~]; and

(3) the lease will be economically beneficial to the department.

(b) The director may authorize the lease of a highway asset if:

(1) the director makes the findings required by subsection (a) of this section; and

(2) the term of the lease does not exceed two years, or the lease contains a cancellation clause by which the department, in its sole discretion, may terminate the lease with not more than two years notice.

§21.603. Methods of Awarding Leases.

(a) The department may, in its sole discretion, award a

1 lease by any method it determines to be in its best
2 interest. [~~Leases will be awarded on a sealed bid basis with the~~
3 ~~department having the right to reject all bids, except that~~
4 ~~leases for highway assets may be negotiated to be consistent~~
5 ~~with property rights owned by others than the state.]~~

6 (b) Notice of real property available for lease shall be
7 published on the TxDOT website for at least 30 days prior to the
8 date of the lease award. [~~When a lease is awarded on a sealed~~
9 ~~bid basis, notice of the proposed lease will be advertised at~~
10 ~~least 20 days prior to the bid opening. The notice will be~~
11 ~~published once a week for three consecutive weeks prior to bid~~
12 ~~opening in a newspaper of general circulation in the county in~~
13 ~~which the highway asset is located. The department will charge~~
14 ~~not less than fair market value for leases. However, if the~~
15 ~~commission finds it to be in the public interest, the commission~~
16 ~~may waive the fair market value requirement for a lease to a~~
17 ~~public utility provider or an institution of higher education as~~
18 ~~defined by Education Code, §61.003, or for social,~~
19 ~~environmental, and economic mitigation purposes.]~~

20 (c) The department will charge not less than fair market
21 value for leases. However, if the commission finds it to be in
22 the public interest, the commission may waive the fair market
23 value requirement for a lease to a public utility provider or an

institution of higher education as defined by Education Code,
§61.003, or for social, environmental, or economic mitigation
purposes.

§21.604. Lease Agreement. A lease for highway assets shall be
in written form approved by the director and shall include:

(1) information necessary to contact the party
responsible for developing and operating the leased asset;

(2) the amount of the rent, any required deposits, the
term of the lease, and the method of payment of the rental
amounts or deposits;

(3) a statement of the authorized use of the leased
asset;

(4) a statement that any change in the authorized use of
the leased asset is subject to prior written approval of the
director;

(5) a detailed description of the asset to be leased,
which may be three-dimensional where vertical limits are needed;

(6) the general design for the use of the leased asset,
including any improvements to be constructed, any maps, plans,
or sketches necessary to set out the pertinent features in
relation to any highway facility and a description of any
temporary improvements to be provided by the lessee;

1 (7) a statement that [~~than~~] any significant revision in
2 the design of the improvements described in subsection (d) of
3 §21.605 of this subchapter is subject to prior written approval
4 by the district engineer;

5 (8) a statement that the department shall have the right
6 to approve all construction and plans for construction on the
7 leased asset;

8 (9) permission for the employees of and any
9 representatives authorized by the department to enter the leased
10 asset for the purpose of inspection, maintenance, or
11 reconstruction of highway facilities as necessary, or to
12 determine compliance with the terms and conditions of the lease;

13 (10) a statement that any improvements located within the
14 leased asset will be maintained by the lessee at the lessee's
15 sole expense, so as to assure that any structures in the area
16 within the highway asset will be kept in good condition, both as
17 to safety and appearance, and that maintenance will not
18 interfere with highway use;

19 (11) a statement that in the event the district engineer
20 determines that the responsible party has failed in its
21 maintenance obligation, the department has the right to enter
22 the leased asset to perform such work, all at the expense and
23 liability of the lessee;

(12) a statement requiring forfeiture of deposits,
payment to the department of litigation costs, or any other
expense incurred by the department due to nonperformance of the
terms of the lease agreement;

(13) a performance bond when considered necessary by the
department;

(14) adequate public liability insurance for the leased
asset, the conduct of lessee's business, and lessee's
indemnification obligations to the department set forth in the
lease, to be provided by lessee at lessee's sole expense, naming
the department as an additional insured and including other
endorsements as determined to be necessary by the department, in
an amount and form acceptable to the department for the payment
of any damages occurring to the highway facility or to the
public for personal injury, loss of life or property damage
which may occur; except that the director may waive this
requirement when the lease is with a county, city, state agency,
or the federal government and when the entity has assumed the
specific responsibility for payment of any related damages
occurring to the highway facility or to the public for personal
injury, loss of life, or property damage;

(15) a statement that the lease may be terminated when,
in the sole opinion of the department [~~district engineer~~], the

1 asset ceases to be used in accordance with the use provisions or
2 is abandoned;

3 (16) a statement that the lease may be terminated by
4 the department [~~district engineer~~] when, in the sole opinion of
5 the department [~~district engineer~~], there is noncompliance with
6 the terms of the lease or the conditions are violated and
7 noncompliance or violation is not corrected within a reasonable
8 length of time determined by the department [~~district engineer~~]
9 after written notice of noncompliance or violation has been
10 given and that in the event the lease is terminated and
11 the department [~~district engineer~~] determines it necessary to
12 request the removal of lessee improvements located within the
13 asset, the removal shall be accomplished by the lessee in a
14 manner prescribed by the district engineer and at no cost to the
15 department;

16 (17) a statement that the lease and leased premises shall
17 not be transferred, assigned, or conveyed to another party
18 without prior written approval by the director [~~district~~
19 ~~engineer~~];

20 (18) a requirement that the lease or any improvements on
21 the leased asset will be kept free of all liens and will not be
22 used as security for any loan; provided however, the lessee will
23 be allowed to mortgage or otherwise pledge or grant a security

1 interest in the leasehold interest to secure financing for the
2 acquisition of the leasehold and for the construction and
3 operation of an improvement permitted under the lease, subject
4 to the terms and conditions contained in the lease;

5 (19) a statement that the lessee assumes all risks of
6 losses resulting from the lease;

7 (20) a description of nondiscrimination requirements; and

8 (21) any other provisions deemed necessary or desirable
9 by the director.

10
11 §21.606. Requests to Lease.

12 (a) A person desiring to lease a highway asset shall submit
13 a written request through the department's website. [~~to the~~
14 ~~district engineer of the district in which the asset is~~
15 ~~located.~~] Each request shall include:

16 (1) the name and address of the person requesting the
17 lease;

18 (2) a description of the area or interest of the asset to
19 be leased, improvements (if any) proposed to be constructed, the
20 intended use of the proposed leased asset, and a proposed term
21 of lease;

22 (3) sketches or drawings showing the area to be leased,
23 proposed improvements to be constructed, including utilities to

1 serve the improvements, existing highways or other improvements,
2 all means of proposed access to the area, and preliminary
3 drainage plans;

4 (4) adequate information to support findings to authorize
5 leasing of the asset; and

6 (5) the name, address, and telephone number of the
7 individual authorized to furnish any additional information
8 desired by the department regarding a request to lease.

9 (b) The department [~~district engineer~~] may request
10 additional information, reports, or data of any kind deemed
11 desirable in addition to the written request referred to in
12 subsection (a) of this section in order to comply with the
13 requirements of this section.

14 (c) The department [~~district engineer~~] will forward the
15 request for lease to the district engineer, the right of way
16 division for processing and, when appropriate, for preparing
17 recommendations to the commission, the executive director, and
18 the Federal Highway Administration.

19 (d) The department [~~district engineer~~] will inform the
20 potential lessee of the actions taken on the request to lease.